IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-409

WINFRED DAN VALLANCE,
Petitioner,

Against

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED

Page

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The Petitioner, Winfred Dan Vallance, by his attorney, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 13, 1978.

I.

OPINION BELOW

The Court of Appeals for the Fifth Circuit affirmed without opinion the judgment rendered by the District Court of the Northern District of Texas. Both appear in the Appendix of this petition.

II.

JURISDICTION

The Order of Dismissal and Judgment of the District Court was entered on October 18, 1977, and was

subsequently modified by Order Amending Memorandum and Order of Dismissal, Nunc Pro Tunc, entered on the 17th day of November, 1977. The Order of the Court of Appeals for the Fifth Circuit was entered on June 13, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.

QUESTION PRESENTED

Did the District Court err in granting Defendant a summary judgment against Plaintiff?

IV.

STATEMENT OF THE FACTS

In April, 1974, Commander Vallance was treated in the Navy Regional Medical Center in Oakland, California by United States Navy personnel. Commander Vallance checked into the Navy Hospital and an arteriogram was performed. The initial results of the arteriogram were reported to Commander Vallance as "normal." Two days after his release from the hospital, the Navy physicians and radiologists discovered that the arteriogram actually indicated fairly strong evidence of a massive lesion (tumor). No attempt was made by Navy personnel to communicate this information to Commander Vallance. In fact, the eventual removal of such tumor on August 1, 1974, was due only to his continued physical discomfort and his subsequent request for further medical attention. Commander Vallance seeks damages proximately caused by the negligence of the physicians and radiologists of the United States Government under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.*

A summary judgment was rendered for the United States Government against Commander Vallance based on the *Feres* case.[1]

V.

REASONS FOR GRANTING THE WRIT

A. To Cease Discrimination Perpetrated On Military Persons Claiming Under the Federal Tort Claims Act by the Continued Application of the Ambiguous and Self-Serving "Incident of Service" Doctrine of the *Feres* Case.

The "incident of service" exclusion in the *Feres* case has come to have little meaning other than as a tag to hang on a military person's claim without applying sound reasoned principles of law to the facts and circumstances existing in the cases.

Can it be defended on rational principles of law that a military person be denied recovery under the Federal Tort Claims Act for injuries received by and through a negligent military doctor, but to allow a recovery to a military person who has been injured by a negligent military truck driver?[2]

Can it be defended on rational principles of law that a military person be denied recovery under the Federal Tort Claims Act when he is injured by a negligent mili-

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[1] *Feres v. United States*, 340 U.S. 135 (1950).
[2] See *Brooks v. United States*, (Sup. Ct., 1949), 337 U.S. 49.

tary doctor, but to allow a recovery to the same military person under the Federal Tort Claims Act for injuries inflicted by a negligent military doctor to his dependents?[3]

Can it be defended on rational principles of law that a military person be denied recovery under the Federal Tort Claims Act for injuries received by and through a negligent military doctor, but to allow a recovery to a federal prisoner who is injured by a negligent government doctor?[4]

The "incident of service" concept is not defendable on reasoned principles of law. To perpetuate the discrimination inflicted on military persons by the continued application of the "incident of service" doctrine is beneath the dignity of this Court and the United States Government.

B. To Establish a Rational Test So That Military Persons are not Excluded on Fallacious Reasoning From Protection Under the Federal Tort Claims Act.

Existing principles of tort law should be applied to establish the coverage afforded a military person under the Federal Tort Claims Act. Simply stated:

> "Was the military person engaged in the business of his own person or engaged in the furtherance of the affairs of the military at the time the negligent injury was inflicted upon him?

Such a rational test would alleviate the chipping away at the fallacious reasoning of the *Feres* case as evidenced by the courts applying various fictions in order to afford military persons the protection of the Federal Tort Claims Act and avoid the injustice of the *Feres* doctrine.[5]

[3]See *Costley v. United States*, (USCA-5, 1950), 181 F2d 723; see also *Grigalauskas v. United States*, (DC Mass, 1951), 103 F.Supp. 543, (aff'd USCA-1, 195 F2d 494).

[4]See *United States v. Muniz*, (Sup. Ct., 1963), 374 U.S. 150.

VI.

CONCLUSION AND PRAYER

A Writ of Certiorari should issue and the Order of the Fifth Circuit should be reversed.

Respectfully submitted,

LAW OFFICES OF WILLIAM N. WHEAT & ASSOCIATES, P.C.

By _____
William N. Wheat

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Arlington, Texas 76011
Attorney for Petitioner,
Winfred Dan Vallance

Of Counsel:
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[5]See *Knecht v. United States*, (CA Pa., 1957), 242 F2d 929, *Brown v. United States*, (DC W. Va., 1951), 99 F.Supp. 685, and *Rich v. United States*, (DC Pa., 1956), 144 F.Supp. 791.

VII.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon the following by United States Mail, Certified, Return Receipt Requested, on this the 8th day of September, 1978:

Mr. William L. Johnson, Jr.
Assistant United States Attorney
United States Courthouse
Fort Worth, Texas 76102

Solicitor General
Department of Justice
Washington, D. C. 20530

WILLIAM N. WHEAT

VIII.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA 4-77-61

WINFRED DAN VALLANCE
VS.
UNITED STATES OF AMERICA

MEMORANDUM AND ORDER OF DISMISSAL

There is now before the Court Defendant's motion to dismiss and memorandum in support thereof (both filed 27 April 1977). Plaintiff has failed to respond to Defendant's motion as required by the Local *Rules of Practice* before this Court. Accordingly, the Court hereby decides Defendant's motion on the basis of the record and arguments now before it, as provided in the *Local Rules of Practice.*

DISCUSSION

This is a Federal Tort Claims Act suit initiated by Plaintiff under 28 U.S.C. §§1346(b) & 2671-2680, seeking damages in the amount of $1,164,000.00. Plaintiff is alleging that agents and employees of the United States were negligent in improperly interpreting and reporting the results of an arteriogram, and in failing to properly and timely notify him when they discovered the true results of the examination. Original Complaint at ¶ X. He is further alleging that such negligence has caused him to suffer irreparable and

grievous harm both to his physical and mental well-being.

Plaintiff alleges that he is a former member of the United States Navy, who in the early part of 1974, and while he was still on active duty, experienced a neurological disorder in the form of headaches. Military personnel at the Naval Regional Medical Center, Oakland, California, in April 1974, performed a neurological examination, which included an electroencephalogram, a brain scan, and four-vessel cerebral arteriogram upon plaintiff. Original Complaint at ¶ V. Initially, the military personnel took no follow-up action and failed to inform Plaintiff of the results of his arteriogram. Original Complaint at ¶ VII. On further review, however, it became apparent that Plaintiff had a left cerebralpontine angle tumor. Plaintiff's condition became worse in August 1974 and on August 21, 1974, a posterior craniotomy, and an excision of tumor was performed on him. Original Complaint at ¶ VIII.

The underlying issue raised by Defendant's motion is whether a former member of the United States Navy has a cause of action against the United States under the Federal Tort Claims Act if the injuries and damages allegedly sustained by him occurred while he was in active duty status, and the claimed negligent act or acts were committed by other military personnel.

The law is well settled, that the United States can be sued under the Federal Tort Claims Act, and that there are certain conditions and limitations. The con-

ditions and limitations in the Act do not expressly exclude or limit claims of military personnel. However, military personnel, under certain conditions, are excluded from the right to sue the United States under the Federal Tort Claims Act.

Unfortunately, Plaintiff's claim comes within the exclusion, and he will be unable to recover in this cause of action under any state of facts which he might prove in support of his claim. Therefore, this cause of action should be dismissed. *See Conley v. Gibson*, 355 U.S. 41 (1957).

The Supreme Court in both *Feres v. United States*, 340 U.S. 135 (1950), and *Brooks v. United States*, 337 U.S. 49 (1949), has construed the Federal Tort Claims Act as containing both an exclusion and a limitation. In *Feres*, the Supreme Court found that the United States was not liable under the Act for injuries to servicemen where the injuries arise "out of or are in the course of activity incident to" their services. The original companion cases to *Feres* were *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1950), and *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949), both active duty medical-malpractice cases similar to the case at bar. The issue in each of these cases, was, whether the Federal Tort Claims Act extended its remedy to one standing "incident to the service," what under other circumstances would be an actionable wrong.

While it may be argued that some of the *Feres* doctrine principles and situations have eroded since 1950, the *Feres* doctrine with respect to claims by military

personnel for injuries arising out of or in the course of an activity incident to their service has not so eroded. *Dilworth v. United States*, 387 F.2d 590 (3rd Cir. 1967); *Bailey v. DeQuebedo*, 375 F.2d 72 (3rd Cir. 1967). In *Kilduff v. United States*, 248 F.Supp. 310 (E.D. Va. 1960), the serviceman claimed that military physicians failed to inform him of a lung condition until after he was discharged from the service. The *Kilduff* Court, nevertheless, found his claim not cognizable under the Federal Tort Claims Act. *See also Schwager v. United States*, 326 F.Supp. 1081 (E.D. Penn. 1971).

While the injuries and disability claimed by Plaintiff in this cause of action are unfortunate and tragic, there is no basis under the Tort Claims Act which affords him any relief. His claim comes within the meaning of the *Feres* doctrine in that the alleged injuries and damages were sustained while Plaintiff was on active duty in the United States Navy, and the alleged negligent acts were committed by military personnel who were also on active duty.

ORDER

Accordingly, the Court hereby ORDERS that the above-referenced cause of action be dismissed for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter.

Signed this 18 day of October, 1977.

/s/ *Eldon B. Mahon*
Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA 4-77-61

WINFRED DAN VALLANCE
VS.
UNITED STATES OF AMERICA

JUDGMENT

This action came on for hearing before the Court, Honorable Eldon B. Mahon, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the Plaintiff Winfred Dan Vallance take nothing, that the action be dismissed on the merits and that each party bear its costs of action.

Signed this 18 day of October, 1977.

/s/ *Eldon B. Mahon*
Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA 4-77-61

WINFRED DAN VALLANCE
VS.
UNITED STATES OF AMERICA

MOTION FOR AMENDMENT OF MEMORANDUM AND ORDER OF DISMISSAL, NUNC PRO TUNC

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, WINFRED DAN VALLANCE, and moves the Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to amend the Memorandum and Order of Dismissal, nunc pro tunc, which was rendered by Honorable Eldon B. Mahon, District Judge, on October 18, 1977. The following words should be substituted for Lines 3 through 7 of Paragraph 1:

> "Plaintiff responded to Defendant's motion on September 22, 1977, by filing his Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment and Memorandum in Support thereof. Accordingly, the Court hereby decides the motions filed by Plaintiff and Defendant on the basis of the record and arguments now before it, as provided in the *Local Rules of Practice.*"

This motion is based on the records and files herein, and has been discussed with counsel for Defendant, Mr. William L. Johnson, Jr. Said counsel for Defendant has stated he does not oppose this motion and does not object to the entry of the attached Order.

Respectfully submitted,

DUKE, DUKE & JELINEK
Attorneys at Law
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(817) 461-5500
/s/ *David Duke*
By.....
David Duke
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA 4-77-61

WINFRED DAN VALLANCE
VS.
UNITED STATES OF AMERICA

ORDER AMENDING MEMORANDUM AND ORDER OF DISMISSAL, NUNC PRO TUNC

The motion of Plaintiff, WINFRED DAN VALLANCE, for amendment of the Memorandum and Order of Dismissal, nunc pro tunc, entered in the above-entitled cause on October 18, 1977, having been duly served and filed, and there being no opposition to said motion by counsel for Defendant, and it appearing to the Court that the Memorandum and Order of Dismissal as heretofore entered in this cause does not correctly state the decision of the Court by reason of an error in preparation of such Memorandum and Order of Dismissal; therefore,

IT IS ORDERED that the Memorandum and Order of Dismissal and the record thereof be amended nunc pro tunc to read as follows:

Paragraph 1, Lines 3 through 7:

> "Plaintiff responded to Defendant's motion on September 22, 1977, by filing his Motion for Summary Judgment and Response to Defendant's

Motion for Summary Judgment and Memorandum in Support thereof. Accordingly, the Court hereby decides the motions filed by Plaintiff and Defendant on the basis of the record and arguments now before it, as provided in the *Local Rules of Practice.*"

Dated at Fort Worth, Texas, this 17 day of November, 1977.

/s/ *Eldon B. Mahon*
UNITED STATES DISTRICT JUDGE

The foregoing Order Amending Memorandum and Order of Dismissal, Nunc Pro Tunc is hereby:

APPROVED AS TO
FORM AND CONTENT:

/s/ *David Duke*
DAVID DUKE, Attorney for Plaintiff

/s/ *William L. Johnson, Jr.*
WILLIAM L. JOHNSON, JR.,
Attorney for Defendant

Winfred Dan VALLANCE,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 78-1051
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 13, 1978.

Appeal from the United States District Court for the Northern District of Texas.

Before MORGAN, CLARK, and TJOFLAT, Circuit Judges.

PER CURIAM:

The plaintiff, Winfred Dan Vallance, appeals the district court's dismissal of his Federal Tort Claims Act [F.T.C.A.][1] suit for failure to state a claim upon which relief can be granted. We affirm.

In April 1974, while serving in active duty as a United States naval officer, Vallance entered the Navy Regional Medical Center in Oakland, California, for diagnosis of head pains. United States Navy personnel performed an arteriogram, the results of which they termed normal. In August 1976, Vallance returned to

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

[1] 28 U.S.C.A. § 1346 *et seq.* (1976).

the hospital with increased pain. Hospital personnel discovered and removed a large tumor. Allegedly, the April test results showed the tumor, but the results had been misread. Vallance charged that hospital personnel discovered the mistake after he left in April, but did not notify him. Vallance contends that the delay in treatment increased the degree of permanent damage he suffered.

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court interpreted the F.T.C.A. to exclude liability for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161. Vallance argues that in seeking medical treatment at the Navy hospital he was engaged in "business of his own person," such that the injuries he sustained through alleged medical malpractice did not arise in the course of activity incident to service.

In *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969), a case presenting a factual situation similar to that in the case at bar, we stated:

> it is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service[.]"

421 F.2d at 171-172. [Citation omitted.] Under *Shults*,

Vallance engaged in activity incident to service in being treated at the Navy hospital while on active duty; therefore, he cannot maintain an action under the F.T.C.A. The order dismissing Vallance's complaint for failure to state a claim upon which relief can be granted is

AFFIRMED.

No. 78-409

In the Supreme Court of the United States

OCTOBER TERM, 1978

WINFRED DAN VALLANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-409

WINFRED DAN VALLANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671, seeking damages for injuries allegedly resulting from negligent treatment by Navy doctors while petitioner was on active duty. The district court entered summary judgment against petitioner under *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the United States is not liable under the Federal Tort Claims Act for injuries to servicemen that "arise out

of or are in the course of activity incident to service" (*id.* at 146). The court of appeals affirmed (Pet. App. 17-19).

Further review is unwarranted. Contrary to petitioner's contention (Pet. 3, 5), the *Feres* case has not been undermined by subsequent decisions, and it should not be overruled. This Court recently reaffirmed the doctrine established by *Feres* in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).[1] In *Stencel Aero* the Court recognized that the reasons supporting the *Feres* decision, "[t]he peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline * * *' " continue to have force and support the rule that servicemen injured by the negligence of military personnel while on active duty may not sue under the Federal Tort Claims Act. *Id.* at 671-672, quoting from *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See also *Feres* v. *United States*, *supra*, 340 U.S. at 145.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978

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[1] The cases on which petitioner relies (Pet. 5 n.5) all predate *Stencel Aero*.

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